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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

PRESBYTERY OF SEATTLE,

Petitioner,

v.

KING COUNTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

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QUESTIONS PRESENTED

1. Did the Washington Supreme Court err in establishing a "threshold inquiry" for reviewing the constitutionality of land use regulations which screens out potential takings claims and redefines those claims for review under substantive due process standards for which the only remedy will be invalidation rather than compensation? Does this "threshold inquiry" undermine the regulatory takings doctrine founded in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), and the compensation requirement upheld in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)?

2. What is the relevant unit of property to be considered for takings analysis purposes? Are some regulatory actions so complete in depriving the owner's use of a significant portion of a parcel that the action should be recognized as a taking of that portion?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this action. The plaintiff corporation does not have any parent or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

OPINIONS BELOW

The decision of the Washington Supreme Court is reported at 114 Wash. 2d 320, 787 P.2d 907 (1990), and is reproduced as Appendix A (App.). Page references are to the version in the appendix. The unpublished decision of the Washington Court of Appeal, Division 1, is reproduced as Appendix B.

JURISDICTION

The decision of the Washington Supreme Court, review of which is sought in this petition, was entered on March 15, 1990. The order denying a petition for rehearing was filed on May 17, 1990. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part: "[N]or shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

The ordinance at issue is King County Ordinance No. 7746, passed September 2, 1986. The relevant provisions of the ordinance are set out in Appendix E.

STATEMENT OF THE CASE

This is an inverse condemnation action. The property owner, Presbytery of Seattle (Presbytery), contends that a King County land use regulation takes Presbytery's property for public use without payment of just compensation. Presbytery below sought compensation as

guaranteed by the Just Compensation Clause of the Fifth Amendment to the United States Constitution.[1]

The decision of the court below rejected Presbytery's compensation claim. That decision articulates a new and radically different approach for evaluating land use regulations under the federal Constitution. The novel path chosen by the Washington court, which will be discussed in greater detail below, limits regulatory takings claims to cases where the regulation "actually enhances a publicly owned right in property." App. at A-9. If the regulation does not enhance public rights in property, but instead seeks to prevent public harm, a takings analysis is not employed. In that event, the Washington court found that property owners are relegated to an invalidation remedy under substantive due process standards. App. at A-10. In short, except in narrowly restricted types of cases, the court below has resurrected the "invalidation only" rule adopted in California, and overruled by this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The decision below accomplishes this result by use of a "threshold inquiry" employed to determine whether a

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[1] The federal question sought to be reviewed was initially raised in the complaint. App. F (complaint alleging that county's regulatory actions constitute inverse condemnation of Presbytery's land). Presbytery's motion for partial summary judgment states the issue as being whether the challenged ordinance constitutes a taking contrary to the federal constitution. App. G. The federal takings issue was subsequently raised in each stage of the appellate proceedings (App. at B-6, 7) and the decision of the court below directly addresses the federal takings issue raised in this petition. App. A.

takings analysis or, alternatively, a due process analysis is to be followed. Presbytery contends that this new threshold test improperly screens out valid takings claims and, more fundamentally, is in direct conflict with regulatory takings principles and standards long established by this Court. As will be shown, the court's novel interpretation of the Fifth Amendment is without precedent and conflicts with decisions of other state high courts and the United States Court of Appeals for the Fourth, Fifth, Ninth, and Eleventh Circuits.

The essential facts necessary for consideration of this petition are straightforward. Presbytery owns a four and one-half acre parcel in an unincorporated area of King County, Washington, near the community of Federal Way. Presbytery purchased the property in 1978 for the purpose of constructing a new church. App. at A-2.

A portion of Presbytery's parcel is within a wetland.[2] This wetland, known as Hylebos Wetland No. 18, is a "class 1" wetland[3] and has been in existence for over 12,000 years. The county claims it is the last major wetland in the Federal Way area and is of major environmental significance. App. at A-3.

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[2] The county's wetland planner explained by affidavit the ecological conditions of a wetland. The court below reproduced that explanation in Footnote 3 of its opinion. *See* App. at A-2 n.3.

[3] The county's wetland planner stated that wetlands are rated No. 1 if there is a presence of rare, endangered, or threatened species and the wetland is a sensitive or outstanding potential habitat for the species. App. at A-3 n.6.

In 1986 King County enacted Ordinance No. 7746 which updated the community plan and zoning for the Federal Way area. App. at A-4; App. E. The Washington Supreme Court viewed the ordinance as one which prohibits new construction within the wetland boundaries. App. at A-4. Although the precise boundary line has not been marked, the parties concur that at least one-third of Presbytery's parcel is within Hylebos Wetland No. 18. App. at A-3. Presbytery contends that by precluding all use of its property within the wetland boundary, Ordinance No. 7746 effects a taking for public use without just compensation of at least one-third of its property.

Presbytery filed its inverse condemnation complaint in state court and subsequently moved for summary judgment on the takings issue (reserving calculation of damages for a future hearing). App. G. The county filed a cross-motion for summary judgment seeking dismissal of the claim. The trial court ruled in favor of the county and dismissed the lawsuit on grounds that Presbytery had failed to exhaust its administrative remedies. App. at C-2. The Washington Court of Appeals affirmed. App. at B-1. The Court of Appeals concluded its opinion by explaining that the merits of Presbytery's takings claim based on the federal Constitution need not be addressed due to disposition of the matter on the exhaustion issue. App. at B-6, 7.

The Washington Supreme Court granted Presbytery's petition for review. In the decision below, review of which is here sought, the Washington Supreme Court explained in a "prefatory note" that it "is impossible to analyze the exhaustion doctrine and its futility exception without first having a clear understanding of the tests to

be utilized for regulatory takings . . . . Therefore, this opinion commences with a consideration of recent state and federal case law regarding constitutional limitations on land use regulations." App. at A-6.

Having set its course, the opinion below embarks on a discourse regarding constitutional review of land use regulations. That discussion is highlighted by the court's establishment of its "threshold inquiry." App. at A-8. This new inquiry is of paramount concern and is the primary focus of this petition.

In addition to concerns regarding Washington's new test for screening out federal takings claims, the decision below presents a second significant issue. That issue involves defining the relevant unit of property to be considered for takings analysis purposes.

The ordinance challenged in this case prohibits any development of land lying within the boundary of Hylebos Wetland No. 18. App. at A-4; B-2. Regardless of what uses may or may not be available for the rest of the parcel, Presbytery maintains that at least the area within the wetland boundary has been taken within the meaning of the Constitution.

The county responds by contending that the relevant unit of property to be considered for takings purposes is not limited to the land within the wetland boundary. The takings analysis, according to the county, must focus on whether the parcel as a whole has been taken. The county therefore suggests that since some portions of Presbytery's property may be developed, the parcel as a whole has not been taken.

Resolving the "relevant parcel" issue is a prerequisite to determining whether the futility exception to the exhaustion doctrine applies in this case. The court below decided that the relevant parcel was the entire four and one-half acre lot owned by Presbytery. App. at A-15, 16. Therefore, that court analyzed the futility exception with reference to the entire lot and concluded that applications to develop nonwetlands portions of the property may not be futile. App. at A-20. In contrast, if the relevant unit of property for takings analysis purposes is the specific land area impacted by the wetlands protection ordinance, the futility exception must be considered with reference to that specific portion of Presbytery's property. Under these circumstances, it is clear that any further efforts to exhaust would be futile because the ordinance imposes an absolute ban. At the very least, Presbytery would be entitled to a remand of the matter to the state court for determination of the futility issue in light of the proper relevant parcel analysis.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way in conflict with another state court of last resort, or of a Federal Court of Appeals. Under Rule 10.1(c), a ground for review exists when a state court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with

applicable decisions of this Court. All four of these grounds for review are present in this case.

I

THE "THRESHOLD INQUIRY" ESTABLISHED IN THE DECISION BELOW DIRECTLY CONFLICTS WITH ESTABLISHED DOCTRINE OF THIS COURT

The stated purpose of the threshold inquiry established by the Washington court is to determine whether a land use regulation should be analyzed under a takings analysis or, alternatively, under a due process analysis. In practical effect, the inquiry amounts to a new hurdle that property owners in Washington must clear in order to bring a takings claim. If the hurdle is not cleared, the compensation remedy is not available and the owner's recourse is simply to pursue a due process claim seeking invalidation of the ordinance.

Avoiding the compensation remedy which accompanies takings claims was a major concern of the Washington court. Indeed, that concern appears to be a motivating factor for establishing the threshold inquiry and thereby converting many takings claims into due process claims. The court below stated:

> "Invalidation of the ordinance (instead of compensation) also avoids intimidating the legislative body, a situation about which we have previously expressed concern. . . . Accordingly, many challenges to land use regulations will most appropriately be analyzed under a due process formula rather than under a 'taking' formula." App. at A-12, 13, 14.

Of course, this Court has rejected such policy concerns when balanced against the constitutional command of the

Just Compensation Clause. *First Church*, 482 U.S. at 317. By resurrecting those concerns and redefining takings claims into due process claims, the decision below attempts to circumvent this Court's *First Church* decision.

A careful examination of the substance of the threshold inquiry reveals an even more fundamental conflict with Supreme Court doctrine. The primary focus of the threshold inquiry is for the court to determine "whether the challenged regulation safeguards the public interest in health, safety, the environment or the fiscal integrity of the area." App. at A-9. Such a regulation is to be "contrasted with one that goes beyond preventing a public *harm* and actually enhances a publicly owned right in property." App. at A-9 (emphasis in original). In short, a court must determine whether the "predominant goal" of the regulation is to protect against public harm as opposed to conferral of a public benefit, *i.e.*, enhancing a publicly owned right in property. App. at A-9 n.13.

The court below thus embraces the theory that regulatory action can result in a taking only when government uses its police power to confer a benefit upon itself, as contrasted with preventing a public harm.[4] At the very outset, this inquiry is meaningless since, as Justice

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[4] The decision below also acknowledges that a taking may occur when a regulation destroys a fundamental attribute of ownership, which it narrowly defines as the rights to possess, to exclude others, and to dispose of property. App. at A-9, 10. However, the court below has conspicuously omitted the right to make reasonable use of property from its definition. *Compare United States v. General Motors*, 323 U.S. 373, 378 (1945). The (continued)

Brennan explained: "Because police power regulations must be substantially related to the advancement of the public health, safety, morals, or general welfare, it is axiomatic that the public receives a benefit while the offending regulation is in effect." *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting) (citation omitted).

Nevertheless, the court below adopts the described approach which derives in part from the 1964 doctrinal writing of Professor Joseph L. Sax.[5] However, Professor Sax abandoned his theory in a subsequent 1971 article.[6] Later, in a 1980 article, Professor William B. Stoebuck recognized that Sax had abandoned his original thesis and that the field was open for recapture. Stoebuck, *Police Power, Takings, and Due Process*, 37 Wash. & Lee L. Rev.

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apparent purpose of including this limited basis for pursuing takings claims is to avoid an obvious conflict with certain decisions of this Court. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (right to exclude); *Hodel v. Irving*, 481 U.S. 704 (1987) (right to devise property to one's heirs).

[5] Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964). Professor Sax suggested that government land use regulations fall into one of two categories based on the purpose for the regulation. The regulation either enhances the government's resource position (*i.e.*, the government acts in an enterprise capacity), or mediates disputes among citizens (*i.e.*, government acts in an arbitral capacity). Economic loss suffered by landowners as a result of government actions in an enterprise capacity (public resource enhancement) is compensable whereas government actions in an arbitral capacity are not compensable.

[6] Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149 (1971).

1057, 1077 (1980). Professor Stoebuck then proceeded in his own article to reformulate Sax's basic idea, but Stoebuck supported the theory upon a different doctrinal basis. Stoebuck wrote a second article in 1983 to further clarify his theory and to compare that theory to Justice Brennan's influential opinion in *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621 (Brennan, J., dissenting). *See* Stoebuck, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 Wash. U.J. Urb. & Contemp. L. 3 (1983) (Stoebuck II).

The court below, both in the decision now sought for review and in a prior 1987 decision, candidly recognized the influence of Professor Stoebuck's articles on that court's view of regulatory takings doctrine. App. at A-11; *Orion Corporation v. State*, 109 Wash. 2d 621, 645-46, 747 P.2d 1062 (1987). A comparative reading of Stoebuck's articles with the court's decision below clearly reveals significant parallels. Unfortunately, the doctrine espoused by Professor Stoebuck, and now by the Washington Supreme Court, regardless of its theoretical merits or weaknesses, does not reflect the regulatory takings doctrine and jurisprudence of this Court.

Stoebuck's theory is that there is a *qualitative* or *conceptual* difference between exercises of the police power and de facto takings by eminent domain. He contends that while police power actions may impair or affect an owner's property rights, a taking requires a "transfer" whereby the owner not only loses rights but also the governmental entity gains corresponding rights. *See generally* Stoebuck II at 36-40. Stoebuck gives effect to his transfer theory in his summary of the proposed test by stating, "a regulation should be a 'taking' only when [the

regulation's] benefits specially and directly augment governmentally owned rights in land." Stoebuck II at 41. Although different words are used, the substance of Stoebuck's test is identical to the threshold inquiry set forth in the decision below which distinguishes between regulations which prevent public harm and those which "actually enhance[] a publicly owned right in property." App. at A-9.

The fundamental inconsistency between this approach and federal takings jurisprudence is that federal law does not recognize a conceptual difference between exercises of the police power and de facto takings. Unlike Stoebuck and the decision below, federal precedent clearly establishes that the difference between police power regulatory actions which cause takings, and those which do not, is a matter of the degree of interference with private rights. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 413, 416 (1922) (taking occurs where the "extent of diminution . . . reaches a certain magnitude"; takings issue "is a question of degree"); *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978) (identifying several factors to be considered in takings analysis); *San Diego Gas*, 450 U.S. at 641 (Brennan, J., dissenting) (regulatory takings issue is a question of degree); *see generally* Bosselman, Callies, and Banta, *The Takings Issue* 133-36 (1973).

Professor Stoebuck recognizes that his takings theory (requiring that a regulation augment government owned rights in land, *i.e.*, that it confer a public benefit or enhance publicly owned rights in property) is a novel

approach to defining regulatory takings and is conceptually at odds with this Court's precedent. Indeed, Professor Stoebuck agrees that he is charting new waters.

> "[T]he theory being propounded here differs fundamentally and radically from most thinking on the police power 'taking' problem. As seen previously, all judicial theories, and much of the scholarly writing, that allow for regulations to become takings follow or are variations upon *Pennsylvania Coal Co. v. Mahon*. *Mahon*'s thesis is that it is only a matter of degree whether a regulation comes to a 'taking.' There is no qualitative difference between a regulation that 'affects' and a regulation that 'takes' 'property,' only a matter of severity or degree. The central thesis in the present article is that there is a principled, qualitative difference between the operation of regulations that are and those that are not 'takings.'" Stoebuck II at 76-77.

As a scholar, Professor Stoebuck is free to disagree with the existing regulatory takings doctrine adhered to by this Court over the years. However, the court below is not so unrestricted. With regard to its pronouncement of federal constitutional law, the court below must adhere to the established doctrine of this Court. In *First Church*, the majority followed Justice Brennan's lead in *San Diego Gas* (despite Professor Stoebuck's suggestion that there is "a better way") and conclusively stated that *Pennsylvania Coal Co. v. Mahon* is "established doctrine" which has been "unhesitatingly applied" by later Supreme Court cases. *First Church*, 482 U.S. at 316-17.

The decision of the court below represents a dramatic break with Supreme Court regulatory takings principles. The practical impact of accepting Professor Stoebuck's

theory is that regulatory takings claims will be all but eliminated and property owners will be forced to rely on due process grounds for constitutional protection. Stoebuck summarizes the situation this way:

> "The fundamental problem with *Mahon*'s 'too far' test is that it takes into account only one side of the transfer that must occur for a 'taking.' It fails to recognize the transfer element. It considers only the owner's loss and makes a 'taking' turn on the degree of loss. The theory propounded here turns upon a principled, qualitative difference in the operation of regulations that cause or do not cause 'takings.' . . .
>
> " . . . The 'taking' theory proposed would most surely reduce to very few the number of regulations that would effect 'takings.' A vital due process doctrine would be necessary to impose a meaningful constitutional limitation upon those land use regulations." Stoebuck II at 40.

It is not by coincidence that the Washington court in the decision below includes a discussion of substantive due process standards. App. at A-10. The court below engaged in that discussion even though Presbytery's complaint states only an inverse condemnation claim. *See* App. F. Moreover, the court's discussion of due process includes direct reference to Stoebuck's article and his suggested due process considerations. App. at A-11. The effect of the decision below is most apparent. It will narrow the door for takings claims (eliminating the remedy of compensation) and will redirect those challenges

into due process claims (where the only remedy will be invalidation). If federal constitutional law is to be altered in this manner, this Court, and only this Court, is the judicial forum which should be responsible for so doing.

By accepting Stoebuck's concept of regulatory takings, and weaving that concept into its analysis in the form of a threshold inquiry, the decision below necessarily creates a new takings test that is not consistent with the regulatory takings tests formulated by this Court. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court was very clear in establishing that a zoning regulation "effects a taking if the ordinance does not substantially advance legitimate state interests, *or* denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260 (emphasis added; citations omitted). The *Agins* formulation was repeated and applied by this Court in both *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987), and *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987).

Significantly, the *Agins* takings analysis does not include any threshold requirement that a regulation enhance a publicly owned right in property as contrasted with preventing a public harm. Moreover, the zoning regulation challenged in *Agins* would not have survived the threshold inquiry now propounded by the Washington court. The open space ordinance challenged in *Agins* was adopted for public safety and environmental reasons, *i.e.*, the predominant purpose was to protect against

public harm.[7] Also, there was no publicly owned right in property that was enhanced by the ordinance. Therefore, under the threshold test, the ordinance would have been insulated from any further takings analysis and the case dismissed. Of course, the *Agins* Court did not insulate the ordinance from Takings Clause review and the two-prong formulation stated in *Agins* has become the accepted framework for guiding the regulatory takings analysis.

A number of state courts of last resort have applied the *Agins* two-prong approach to the regulatory takings issue. Those cases do not recognize the theory that regulatory takings claims are limited to situations where the challenged ordinance enhances publicly owned rights in property. For example, in finding New York's single room occupancy conversion ordinance unconstitutional on takings grounds, New York's highest court expressly followed the *Agins* two-prong approach for analyzing regulatory takings claims.

> "It is basic, however, that such a burden-shifting regulation of the use of private property will, without more, constitute a taking: (1) if it denies an owner economically viable use of his property, *or* (2) if it does not substantially advance

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[7] Regarding the challenged open space zoning ordinance, this Court stated: "The City Council of Tiburon found that '[i]t is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl.' Ordinance No. 124 NS § 1(c)." *Agins*, 447 U.S. at 261 n.8.

> legitimate State interests. Either would be sufficient to invalidate a property-use regulation." *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 1065-66 (N.Y. 1989) (emphasis added by New York Court; citations omitted).

Similarly, the Supreme Court of Michigan recently recognized that the *Agins* approach is "well-established." *Electro-Tech, Inc. v. H.F. Campbell Company*, 445 N.W.2d 61, 66 (Mich. 1989). Again, there is no additional requirement that the regulation be one that confers a public benefit as contrasted with preventing a public harm. *Accord McClimans v. Board of Supervisors of Shenango Township*, 529 A.2d 562, 568 (Pa. Commw. 1987); *Department of Natural Resources v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000, 1002-07 (Ind. 1989).

Numerous federal circuit courts have also expressly followed the *Agins* analytical approach without any additional inquiry into whether the regulation enhances publicly owned rights in property as contrasted with preventing a public harm. *Lake Nacimiento Ranch Company v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir. 1987) (as-applied taking claim dismissed on ripeness grounds, facial claim analyzed under *Agins*); *Sederquist v. City of Tiburon*, 765 F.2d 756, 761 (9th Cir. 1984); *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483, 1486 (11th Cir. 1988); *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1080 (5th Cir. 1989); *Georgia Outdoor Advertising v. City of Waynesville*, 900 F.2d 783, 787 (4th Cir. 1990).

Thus it is clear that the decision below is inconsistent with and undermines federal constitutional takings

doctrine and, in so doing, establishes a test that conflicts with the takings analysis adopted by this Court and followed by state and federal courts throughout the nation. The Washington decision is an aberration of federal law which this Court should fix. If the decision below is allowed to stand in its present form, property owners in that state will be deprived of constitutional rights and remedies that they would otherwise enjoy if they lived elsewhere. In addition, the decision below, if allowed to remain in the books, will surely be cited elsewhere and thereby inject confusion and disarray to an area of the law that this Court in recent years has attempted to bring into some semblance of order.

A proper understanding of the relationship between land use regulations and the Takings Clause is of critical importance to both property owners and government regulators. Regulators, concerned with fiscal realities, must know with greater certainty the extent of potential liability when enacting land use regulations. Similarly, property owners responding to regulatory actions must be informed of the dimensions of constitutional protection afforded them. The decision below, by embarking on a new and unprecedented constitutional approach to land use regulation, creates uncertainty for all concerned.

II

DEFINING THE RELEVANT PARCEL FOR TAKINGS PURPOSES IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

This Court has previously stated that the relevant unit of property to be considered for takings purposes is

the "parcel as a whole" (*Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 131 (1978)) and that the aggregate bundle of property rights must be "viewed in its entirety." *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). However, this Court has also stated that "these verbal formulizations do not solve all of the definitional issues that may arise in defining the relevant mass of property." *Keystone*, 480 U.S. at 497.

The inadequacy of these verbal formulations for all factual circumstances was clearly revealed in *Hodel v. Irving*, 481 U.S. 704 (1987). Despite the prior ruling in *Allard*, this Court in *Hodel* held that denial of a single strand of property interest was a taking. *Id.* at 718 (deprivation of right to devise property). Justice Scalia, joined by the Chief Justice and Justice Powell, concurred but wrote separately to express the view that *Hodel* was indistinguishable from the situation in *Allard* and therefore concluded that *Hodel* "effectively limits Allard to its facts." *Hodel*, 481 U.S. at 719 (Scalia, J., concurring). Justice Brennan also wrote a concurrence, joined by Justices Marshall and Blackmun, responding to Justice Scalia by stating that *Allard* is not limited to its facts and that *Hodel* is the unusual case. *Id.* at 718 (Brennan, J., concurring).

If anything can be concluded from the foregoing, it is that defining the relevant unit of property to be considered for takings purposes depends upon the particular facts of the case. This would also explain *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), where the Court considered the facts of the case and, based in part upon a master's finding that " 'no practical use can be made of the land in question,' " invalidated a zoning restriction

which applied to only a portion of a larger tract. *Id.* at 187.

In the present case, the wetland protection ordinance literally destroys Presbytery's property rights in approximately one-third of its property. This is not a situation analogous to a setback requirement where the owner still retains the ability to make various uses of the property. Rather, the facts here are more akin to a physical invasion where the ordinance results in a practical ouster of possession and, for the owner, the land is emptied of value. *Cf. Loretto v. Teleprompter Manhattan CATV Corporation,* 458 U.S. 419, 435-36 (1982). Of course, in the physical invasion context, this Court has often recognized that a portion of a parcel may be taken. As stated in *Loretto,* the "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Id.* at 436. Likewise, it has been recognized:

> "Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property." *San Diego Gas,* 450 U.S. at 652 (Brennan, J., dissenting).

In the present case, if the county sought to protect Hylebos Wetland No. 18 by formal condemnation of the relevant portion of Presbytery's property, compensation for that portion would surely be required. Achieving the identical public objective through regulatory means is not a sufficient basis to deny compensation because Presbytery's rights in the property have, for all practical purposes, been equally extinguished. Under the particular

facts of this case, this Court should address the relevant parcel issue and, in so doing, should recognize the view that "[a] taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some 'reasonable' use of his property." *Penn Central*, 438 U.S. at 149 (Rehnquist, J., dissenting).

The difficulty that the Washington Supreme Court has had with this very issue also underscores the need for clearer direction from this Court. In an opinion issued only two years prior to the present decision, the Washington Supreme Court found a taking where a Seattle greenbelt ordinance affected only a portion of the plaintiff's parcel. In responding to the city's argument that the owner retained economically viable use of the remaining part of the parcel, the court stated:

> "According to this argument, the City should be allowed to regulate away all rights of ownership to a portion of a person's property, so long as some part of the property remains usable. We find this argument unpersuasive. If the City were to take a portion of certain properties for the purpose of building a road, clearly we would hold that the City must pay for the land so taken. Likewise where, as here, the City takes a portion of certain properties for the purpose of preserving greenbelts, the City must pay for the land taken. To permit the City to accomplish the same purpose under the guise of a zoning regulation would be inequitable and would constitute an unconstitutional taking of private property without just compensation." *Allingham v. City of Seattle*, 109 Wash. 2d 947, 749 P.2d 160, 163 (Wash. 1988).

In the opinion below, the court begins by finding a need to "clarify" its earlier opinion in *Allingham* (App. at A-1) and ends up overruling it. App. at A-16. This abrupt reversal demonstrates that clarification is needed from this Court on the relevant parcel issue.

CONCLUSION

For the foregoing reasons, petitioner respectfully urges this Court to grant this petition for writ of certiorari and reverse the judgment of the Washington Supreme Court.

DATED: August, 1990.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

PRESBYTERY OF SEATTLE, a Washington corporation,	)	
	)	No. 56111-7
Petitioner,	)	
	)	EN BANC
v.	)	
KING COUNTY,	)	
	)	
Respondent.	)	
	)	
ANDERSEN, J. –	)	
	)	(Filed ___)

FACTS OF CASE

A well respected commentator on land use law, Professor Richard L. Settle of the University of Puget Sound Law School, recently wrote that "[r]egulatory taking doctrine is the most perplexing area of American land use law."[1] By our opinion herein, we deal with that subject, elaborate upon our opinion in *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988), and clarify this court's recent opinion in *Allingham v. Seattle*, 109 Wn.2d 947, 749 P.2d 160 (1988).

In this case, the owner of property containing wetlands appeals the dismissal of its inverse condemnation[2]

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[1] Seattle, *Regulatory Taking Doctrine in Washington: Now You See It. Now You Don't*, 12 U. Puget Sound L. Rev. 339 (1989).

[2] This court has defined inverse condemnation as an "action brought against a governmental entity having the power of eminent domain to recover the value of property (continued)

action based upon the owner's failure to exhaust its administrative remedies.

In 1978 the Presbytery of Seattle purchased a single family home located on approximately 4.5 acres of land in Federal Way for $60,000. The financing documents indicate the property was purchased for the construction of a church.

In 1979 the Presbytery informed the Federal Way Planning and Development Commission that in 1980 it intended to begin construction of a church. However, for financial reasons, that building plan fell through. The Presbytery continued to rent out the existing home located on the property and has never filed an application for a development permit for the property.

Part of the Presbytery's property contains a "wetland".[3] King County's wetland planner submitted an

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which has been appropriated in fact, but with no formal exercise of the power." *Martin v. Port of Seattle*, 64 Wn.2d 309, 310 n.1, 391 P.2d 540, *cert. denied*, 379 U.S. 989, 13 L. Ed. 2d 610, 85 S. Ct. 701 (1964).

[3] By affidavit, King County's wetland planner explained as follows. A wetland is a swamp, marsh or bog that supports vegetation typically adapted for life in saturated soil conditions. The ecosystem and habitat value of wetlands is reflected by the diversity of the vegetation and wildlife present in the wetland. The more diverse the vegetation, the more complex the wetland. Complex wetland systems provide places of refuge commonly referred to as "niches". These niches serve as mating, breeding and nesting sites as well as locations for spawning. Wetland areas are also the primary habitat for all waterfowl including ducks, geese and shorebirds. Other forms of wildlife, such as fish, mink, coyote, raccoon, and amphibians also rely on the wetlands for their survival. Salmon (continued)

affidavit which stated that prior to the enactment of the 1986 ordinance, which is here challenged, both the State Environmental Policy Act of 1971 (SEPA)[4] and King County's Sensitive Area Ordinance[5] would have been applied to any development application since wetlands are protected by both acts. The record before us indicates that in 1981 King County conducted an inventory of wetlands and concluded that the wetlands involved in this case, Hylebos Wetland No. 18, was a "class 1" wetland.[6] The County provided affidavits to show that this wetland is in excess of 12,000 years old, is one of the last major wetlands in the Federal Way area and is of major environmental significance to King County. It also contains one of the few *old growth cedar bogs* still in existence in the Pacific Northwest. For purposes of this appeal, the parties concur that Wetland No. 18 comprises approximately *one-third* of the Presbytery's property.[7]

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often spawn in the marshy channels of a wetland and the wetland provides seasonal recharge to streams which are critical for the survival of fisheries. If the wetland area is diminished or disturbed, the ecosystem becomes critically unbalanced and environmental impacts are significant. Niches are destroyed and the wildlife habitat is eliminated or significantly reduced.

[4] RCW 43.21C.

[5] King County Code 21.54.

[6] The County's wetland planner stated that wetlands are rated No. 1 if there is a presence of species recognized by the federal governmental as rare, endangered or threatened and the wetland is a sensitive or outstanding potential habitat for such species.

[7] We note that the Presbytery originally alleged that the wetlands comprised a larger percentage of its property than one-third, but apparently because they are seeking summary judgment, are now relying on the County's estimate of one-third. The County explains that the wetland boundary has not yet been established because the current mapping is only an approximation.

In 1986 the County enacted ordinance 7746 (hereafter the 1986 Wetland Ordinance). The ordinance includes prohibitions on creation of new construction within the wetland boundaries and creates a buffer zone around the wetland (which may be increased if endangered species exist within the buffer) and a native growth protection easement. It is the Presbytery's argument that the ordinance prohibits the development of a substantial portion of its property and thereby effects a taking of property without just compensation. The Presbytery's inverse condemnation action alleges that the County's wetland regulations prevent it from using its land for a church or for any other economically reasonable or profitable use.

At the request of the Presbytery's attorney, a consultant studied the impact of the regulations of the property. He noted the property is zoned S-E-P which usually allows 1.2 dwelling units per acre. He drew a map of a subdivision containing five lots of the required size. He then concluded that three or possibly four of the five lots are destroyed for any use other than open space by the 1986 Wetland Ordinance.

The manager of the County's Building and Land Development Division responded that this consultant's opinion was based on the erroneous assumption that the entire parcel of property consisted of dry, buildable land. The County further stated that such a subdivision could violate not only the 1986 Wetland Ordinance, but also SEPA and King County's Sensitive Area Ordinance. The County declares that although no application has as yet been made for the construction of a church, pursuant to the zoning code a church and parking lot could potentially be built on the property.

Both parties moved for summary judgment. The County moved to dismiss on the grounds that the Presbytery had never applied for a building permit and, therefore, had failed to exhaust its administrative remedies. The County argued that it would not be futile to require exhaustion because the property could still be used for building a church, the purpose for which it had been purchased. The County also noted that its Sensitive Area Ordinance allowed for development of wetlands if application of the wetland ordinance "would deny all reasonable uses of a property".[8]

The trial court granted the County's motion to dismiss based on the landowner's failure to exhaust its administrative remedies. The Court of Appeals affirmed in an unpublished opinion.[9] We herein consider the two issues we have determined to be dispositive and affirm both the Superior Court and the Court of Appeals.

ISSUES

ISSUE ONE. Does a land use regulation which prohibits development of a portion of an undivided parcel of property constitute a "taking" of the portion which must remain undeveloped?

ISSUE TWO. Did the Superior Court and the Court of Appeals correctly apply the exhaustion doctrine to the Presbytery's inverse condemnation action?

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[8] King County Code 21.54.170(B) (part).

[9] *Presbytery of Seattle v. King Cy.*, 53 Wn. App. 1074 (1989).

DECISION

PREFATORY NOTE. The issues presented in this case are interrelated and cannot be analyzed as separate and distinct inquiries. It is impossible to analyze the exhaustion doctrine and its futility exception without first having a clear understanding of the tests to be utilized for regulatory takings and substantive due process violations. In considering factual futility, it is necessary to determine whether the governmental body can provide a solution to the land use problem which would avoid the conclusion of an unconstitutional taking or a due process violation. Any case which considers the futility exception to the exhaustion requirement must view it in the context of the constitutional definition of a regulatory "taking". Therefore, this opinion commences with a consideration of recent state and federal case law regarding constitutional limitations on land use regulations.

ISSUE ONE.

CONCLUSION. A land use regulation which prohibits development of one portion of an undivided parcel of property does not necessarily constitute a "taking" of the portion which must remain undeveloped. Mere regulation on the use of land has never constituted a "taking" or a violation of due process under federal or state law. The problem in any given case is to determine when such a regulation exceeds constitutional bounds. In order to determine whether such a regulation would be unconstitutional either as a "taking" or as a violation of substantive due process, it is necessary to follow the proper tests for inverse condemnation and for substantive due process violations due to excessive land use regulation.

The United States Constitution, U.S. Const. amend. 5, provides in relevant part,

> nor shall private property be taken for public use, without just compensation.

The Constitution of the State of Washington, Const. art. 1, § 16, provides in pertinent part:

> No private property shall be taken or damaged for public or private use without just compensation having been first made . . . [10]

The "tests" for over-regulation have until recently proved somewhat of a quagmire of constitutional theory vacillating between substantive due process and "takings" theory. Both this court and the United States Supreme Court have in the past struggled with the difficult determination of where a mere regulation ends and a "taking" commences.

In 1987 the United States Supreme Court attempted to alleviate the confusion in a trilogy of land use regulation cases. *Nollan v. California Coastal Comm'n*, 483 U.S.

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[10] The words "or damaged" in the Constitution of the State of Washington, Const. art. 1, § 16, could make Washington's Constitution more restrictive than the federal "taking" clause. However, no Washington decision has attached significance to the difference in language in the context of police power regulation. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. Puget Sound L. Rev. 339, 344 (1989). However, this court has considered actions wherein the government's actions "damaged", rather than "took" private land to be violative of Const. art. 1, § 16. *See, e.g., Great N. Ry. v. State*, 102 Wash. 348, 173 P. 40 (1919), wherein the government's blasting caused debris to fall on and damage plaintiff's railroad tracks.

825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987). In that same year we also decided *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988) (*Orion* II), which attempted to reconcile past federal and state cases involving regulatory (land use) "takings". *Orion* II utilized and coordinated United States Supreme Court authority, case law of this court and scholarly comment to begin to devise a comprehensive formula for use in determining the constitutionality of land use regulations.

DETERMINATION OF WHETHER TO UTILIZE A "TAKING" ANALYSIS OR A DUE PROCESS ANALYSIS

In this state, a land use regulation which too drastically curtails owners' use of their property can cause a constitutional "taking" or can constitute a denial of substantive due process.[11] These two constitutional theories are *alternatives* in cases where overly severe land use regulations are alleged. It is critical that these two grounds be separately considered and independently analyzed because the remedies for each of these types of constitutional violation are different.

To determine which of these two constitutional tests to utilize, *the threshold inquiry* a court must make is

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[11] *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988) (*Orion* II).

whether the challenged regulation safeguards the public interest in health, safety, the environment or the fiscal integrity of an area.[12] A regulation which does that is to be contrasted with one that goes beyond preventing a public *harm* and actually enhances a publicly owned right in property.[13] Secondly, the court should ask whether the regulation destroys one or more of the fundamental attributes of ownership -- the right to possess, to exclude

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[12] This type of determination has been one of the threads in the regulatory use law in Washington for decades. *See, e.g., Conger v. Pierce Cy.*, 116 Wash. 27, 198 P. 377, 18 A.L.R. 393 (1921); *Rains v. Department of Fisheries*, 89 Wn.2d 740, 575 P.2d 1057 (1978); *Maple Leaf Investors, Inc. v. Department of Ecology*, 88 Wn.2d 726, 565 P.2d 1162 (1977); *Orion* II.

[13] Landowners do not have the right to use their property in a manner injurious to the community. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-92, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987). However, one landowner should not be forced to bear the economic burden to confer a benefit upon the public, the cost of which rightfully should be spread over the entire community. It is the tension between these two concepts which has made "regulatory takings" law so difficult for so many years. We realize that the determination of whether a given regulation seeks to protect the public from harm will not always be an easy decision. Both the conferral of benefit and the prevention of harm are often present in varying degrees. However, the initial decision as to whether the predominant goal of the regulation is the prevention of a real harm to the public or the conferral of a benefit upon other publicly held property must be made according to the facts of each individual case.

others and to dispose of property.[14] If a regulation does not infringe upon a fundamental attribute of ownership, and if it protects the public from one of the foregoing listed harms, then no constitutional "taking" requiring just compensation exists.[15]

SUBSTANTIVE DUE PROCESS

However, even if the regulation protects the public from harm, and does not deny the owners a fundamental attribute of ownership (and is thus insulated from a "takings" challenge), it still must withstand the due process test of reasonableness.[16] The inquiry here must be whether the police power (rather than the eminent domain power) has exceeded its constitutional limits. To determine whether the regulation violates due process, the court should engage in the classic 3-prong due process test and ask: (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses

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[14] Settle, 12 U. Puget Sound L. Rev. at 356. *See Department of Natural Resources v. Thurston Cy.*, 92 Wn.2d 656, 601 P.2d 494 (1979), *cert. denied*, 449 U.S. 830, 66 L. Ed. 2d 35, 101 S. Ct. 98 (1980); *Keystone Coal Ass'n*, 480 U.S. at 488 n.18; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982).

[15] *Orion* II, 109 Wn.2d at 654-57. *See also First English Eyangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 313, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987); *Keystone Coal Ass'n*, 480 U.S. at 488-89; *Maple Leaf Investors, Inc. v. Department of Ecology, supra; Goldblatt v. Hempstead*, 369 U.S. 590, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962); *Mugler v. Kansas*, 123 U.S. 623, 668-69, 31 L. Ed. 205, 8 S. Ct. 273 (1897).

[16] *Orion*, II, 109 Wn.2d at 654-55.

means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the land owner.[17] "In other words, 1) there must be a public problem or 'evil,' 2) the regulation must tend to solve this problem, and 3) the regulation must not be 'unduly oppressive' upon the person regulated."[18] The third inquiry will usually be the difficult and determinative one.

The "unduly oppressive" inquiry lodges wide discretion in the court and applies a balancing of the public's interest against those of the regulated landowner. We have suggested several factors for the court to consider to assist in the determining whether a regulation is overly oppressive, namely: the nature of the harm sought to be avoided; the availability and effectiveness of less drastic protective measures; and the economic loss suffered by the property owner.[19] Another well regarded commentator in this area of the law, Professor William B. Stoebuck of the University of Washington Law School, has suggested a helpful set of nonexclusive factors to aid the court in effecting this balancing. On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less

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[17] *Orion* II, 109 Wn.2d at 646-47. *Lawton v. Steele*, 152 U.S. 133, 38 L. Ed. 385, 14 S. Ct. 499 (1894); *Goldblatt*, 369 U.S. at 594-95; *West Main Assocs. v. Bellevue*, 106 Wn.2d 47, 52, 720 P.2d 782 (1986).

[18] Stoebuck, *San Diego Gas; Problems, Pitfalls and a Better Way*, 25 J. Urb. & Contemp. L. 3, 20 (1983).

[19] *Orion* II, 109 Wn.2d at 655 n. 24 (citing *Goldblatt*, 369 U.S. at 594-95).

oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses. Stoebuck, *San Diego Gas; Problems, Pitfalls and a Better Way*, 25 J. Urb. & Contemp. L. 3, 33 (1983). Use of these factors can materially assist the court in determining whether or not the regulation of use is unduly oppressive to the landowner.

If the regulation is not aimed at the legitimate public purpose, or uses a means which does not tend to achieve it, or if it unduly oppresses the landowner, then the ordinance will be struck down as violative of due process and the remedy is invalidation of the regulation. No compensation (which properly belongs with a "taking" analysis) is warranted in the face of a due process violation.

Invalidation of the ordinance (instead of compensation) also avoids intimidating the legislative body, a situation about which we have previously expressed concern.[20] For example, as commentators have observed in this connection,

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[20] *Orion* II, 109 Wn.2d at 649, explained:

"We can protect landowners from the unfair burden by invoking *either* the constitutional guaranty that property will not be deprived without due process of law, U.S. Const. amends. 5, 14; Const. art. 1, § 3, or the constitutional requirement of just compensation whenever the state exercises its power of eminent domain to take private property for public (continued)

> if local governments in the past had thought that enactment of a land use regulation might result in monetary awards, then "very likely no one would have proposed the planned unit development, the cluster zone, or the floating zone and even if those efforts had received the prior blessing of developers, it is highly unlikely that environmental concerns or regulation of coastal and inland waterways would ever have been risked."

Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues,* 18 Urb. Law. 635, 636 (1986) (quoting Wright, *Exclusionary Land Use Controls and the Taking Issue,* 8 Hastings Const. L.Q. 545, 583 (1981)). Accordingly, many challenges to land use regulations will most appropriately be analyzed under a due process formula rather than under a "taking"

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use. U.S. Const. amend. 5; Const. art. 1, § 16. The crucial difference lies in the remedy to be applied: invalidation or the payment of just compensation.

"This is, of course, not an insignificant difference. Once we characterize an excessive regulation as a taking, the mandate of article 1, section 16 requires just compensation. Likewise, the Fifth and Fourteenth Amendments require payment for the time that the public had use of the land while the regulation remained effective. *First English Evangelical Lutheran Church,* 107 S. Ct. at 2388. Thus, choosing to invoke the takings analysis instead of the due process test will necessarily trigger the specter of financial liability. If all excessive regulations require just compensation, rather than invalidation, land-use decision makers, who adopt regulations in a good faith attempt to prevent a public harm, will nevertheless be held strictly liable for regulations that result in a taking. Undoubtedly, the specter of strict financial liability will intimidate legislative bodies from making the difficult, but necessary choices presented by the most sensitive environmental land-use problems."

formula. This is not to say, however, that a certain class of cases will not have to face a "taking" challenge.

"CONSTITUTIONAL TAKINGS"

Having completed the due process formula, we return to our threshold issue and consider the "taking" analysis used by the United States Supreme Court and by this court in *Orion* II. If we consider threshold inquiries and determine that the challenged regulation goes beyond preventing a public harm to actually enhance a *publicly owned right in property,* or if we determine that the regulation denies the owner a fundamental attribute of ownership,[21] it then becomes necessary to determine whether the regulation effects a "taking" in violation of the Fifth and Fourteenth Amendments and Const. art. 1, § 16.

The "taking" analysis requires that the court first ask whether the regulation substantially advances legitimate state interests. If it does not, then it constitutes a "taking".[22] If it does substantially advance a legitimate state interest, then it becomes necessary to look further and see if the challenge to the regulation is a facial challenge or one involving application of the regulation to specific property. It would not be necessary for the challengers to exhaust administrative remedies in a facial challenge

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[21] Not every infringement on a fundamental attribute of ownership will necessarily constitute a "taking". *See, for example, Pruneyard Shopping Ctr. v. Robins,* 447 U.S. 74, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980).

[22] *Orion* II, 109 Wn.2d at 655-56; *Nollan v. California Coastal Comm'n, supra.*

because the allegation would be that application of the regulation to any property would constitute a "taking".[23] If the case is a facial challenge, then the landowner must show that the regulation denies all economically viable use of any parcel of regulated property in order to constitute a taking.[24] In pursuing this inquiry, however, it first becomes necessary to determine just what property it is that the court is to consider.

With the exception of this court's recent decision in *Allingham v. Seattle*, 109 Wn.2d 947, 749 P.2d 160 (1988), neither state nor federal law has divided property into smaller segments of an undivided parcel of regulated property to inquire whether a *piece* of it has been taken or whether a due process violation has occurred with regard to a *piece* of regulated property. Rather, we have consistently viewed a parcel of regulated property in its *entirety*. Federal case law has also specifically refused to focus its inquiry upon a given portion of a regulated property.[25] As the United States Supreme Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987) (quoting *Penn Cent.*

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[23] Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. Puget Sound L. Rev. 339, 357-58, 392-93 (1989) (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987)).

[24] *Orion Corp. v. State*, 109 Wn.2d 621, 656, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988) (*Orion* II); *Keystone Coal Ass'n*, 480 U.S. at 494-95.

[25] *Keystone Coal Ass'n*, 480 U.S. at 496-97; *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978).

Trans. Co. v. New York City, 438 U.S. 104, 130-31, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978) explained:

> " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights *in the parcel as a whole*—here the city tax block designated as the 'landmark site.' "

Keystone, 480 U.S. at 497.[26] Similarly, our own state case law demonstrates that a regulatory scheme's economic impact is to be determined by viewing the full bundle of property rights in its entirety.[27]

The landowner in the case before us relies heavily on *Allingham's* views of a "taking" which looked only to one portion of the regulated parcel of property. To the extent that *Allingham* is inconsistent with the foregoing analysis, it is hereby overruled. Additionally, to the extent that *Allingham* equates a physical taking of an owner's land with a regulation upon its use, it is also expressly overruled.[28]

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[26] See also Andrus v. Allard, 444 U.S. 51, 62 L. Ed. 2d 210, 100 S. Ct. 318 (1979).

[27] *Orion* II, 109 Wn.2d at 664. *See also Department of Natural Resources v. Thurston Cy.*, 92 Wn.2d 656, 668-70, 601 P.2d 494 (1979), *cert. denied*, 449 U.S. 830, 66 L. Ed. 2d 35, 101 S. Ct. 98 (1980); *Department of Ecology v. Pacesetter Constr. Co.*, 89 Wn.2d 203, 571 P.2d 196 (1977); *Maple Leaf Investors Inc. v. Department of Ecology*, 88 Wn.2d 726, 565 P.2d 1162 (1977).

[28] *See Keystone Coal Ass'n*, 480 U.S. at 488 n.18; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987); *Penn Central*, 438 U.S. at 124.

Returning to our "taking" analysis, if the challenge to the regulation is a facial one, and if the landowner succeeds in showing that a regulation denies all economically viable use of any parcel of regulated property, then a constitutional taking has occurred. Practically, however, this should prove to be a relatively rare occurrence.

If the challenge involves an application of the regulation to specific property, then the court should consider: (1) the economic impact of the regulation on the property; (2) the extent of the regulation's interference with investment-backed expectations;[29] and (3) the character of the government action.[30]

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[29] The vested rights doctrine is an example of judicial recognition of investment-backed expectations. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 Wash. U.J. Urb. & Contemp. L. 3 (1987). In addition, the United States Supreme Court has said the expectation must be "distinct" (*Penn Central*, 438 U.S. at 124) and "reasonable" (*Pruneyard Shopping Ctr.*, 447 U.S. at 83). Professor Mandelker has suggested that "distrinct" implies the expectation must have some concrete manifestation and that "reasonable" implies the expectation must be appropriate under the circumstances. This view of "investment-backed expectations" helps to give content to the analysis.

[30] *Orion* II, 109 Wn.2d at 656 (citing *Keystone Coal Ass'n*, 480 U.S. at 495). In considering the character of the government action, we note that permanent physical invasions (even if of minimal effect on the land) have routinely been held to be takings. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987). However, this fact is subject to a qualification noted by the *Nollan* (483 U.S. at 836) Court. "As a prerequisite for development permission, a regulation may require a landowner to dedicate property rights for public (continued)

If the court determines a "taking" has, in fact, occurred, then just compensation is mandated by the Fifth and Fourteenth Amendments and by Const. art. 1, § 16.[31] If the taking was due to an overly severe land use regulation, and was temporary and reversible, the governmental unit involved has the option of curing the taking or maintaining the status quo by exercising its eminent domain power. Whichever it chooses, just compensation must be paid for the period during which the taking is effective.[32]

EXHAUSTION OF ADMINISTRATIVE REMEDIES

As previously noted, exhaustion would be unnecessary if the landowner was engaging in a facial challenge to the ordinance. However, the record presented in this

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use if the regulatory exaction is reasonably calculated to prevent, or compensate for, adverse public impacts of the proposed development." Settle, *Regulatory Taking Doctrine in Washington: Now You See It. Now You Don't*, 12 U. Puget Sound L. Rev. 339, 356 (1989). "[T]he regulatory exaction must reasonably (that is, quite specifically and proportionately) counter adverse public impact of the proposed development." Settle, 12 U. Pudget Sound L. Rev. at 380 n.243 (citing *Nollan*, 483 U.S. at 836-37). *See also Unlimited v. Kitsap Cy.*, 50 Wn. App. 723, 750 P.2d 651, *review denied*, 111 Wn.2d 1008 (1988) (holding that police power is properly exercised when the problem to be remedied by the exaction arrises from the development under construction).

[31] *Orion* II, 109 Wn.2d at 649; *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987).

[32] *Orion* II, 109 Wn.2d at 626, 668; *First English Evangelical Lutheran Church*, 482 U.S. at 321.

case demonstrates that the landowner has not carried the burden of showing that the regulation denies it all economically viable use of any parcel of regulated property. Therefore, we consider the landowner's exhaustion argument in the context of an "as applied" challenge.

Applying the analysis discussed above to the present case, we could arguably conclude that the challenged regulation seeks to safeguard the public interest in the environment and does not appear to enhance a publicly owned right in other property. However, it would be premature at this time to decide whether the regulation denies an essential attribute of ownership. Assuming without deciding, that the regulation should be scrutinized under the 3-prong due process analysis, we simply do not have all the required facts needed in order for this court to apply that formula.

Although it might be possible to determine that the regulation was aimed at achieving a legitimate public purpose and that it used means to achieve that purpose, on the limited record here presented it is not possible to determine whether the regulation was unduly oppressive to this landowner. Without knowledge of the uses to which this property can legally be put, it is not feasible to consider the factors which help to determine "undue oppressiveness". Exhaustion of administrative remedies is, therefore, necessary in order for a court to have before it the facts necessary to make such a determination.

Although the landowners argue that exhaustion would be futile in this particular case, we disagree. Exhaustion of administrative remedies is generally required before resort to the courts, although exhaustion

is excused if a resort to administrative procedures would be futile.[33] United States Supreme Court case law also concludes that a final governmental decision as to permitted uses of land is generally a condition precedent to resolution of an inverse condemnation claim such as the one before us. As that Court has observed, "[o]ur cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it."[34] Once exhaustion is raised as a defense, the landowner seeking to establish "futility" as an exception to the exhaustion requirement must persuade the court that futility excuses exhaustion.[35] This is a substantial burden because of the strong public policies favoring the exhaustion doctrine.[36]

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[33] *Estate of Friedman v. Pierce Cy.*, 112 Wn.2d 68, 74, 768 P.2d 462 (1989).

[34] *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351, 91 L. Ed. 2d 285, 106 S. Ct. 2561 (1986).

[35] *Estate of Friedman*, 112 Wn.2d at 77.

[36] A presumption favoring the requirement that administrative remedies be exhausted exists, based on the following policies:

> [T]o (1) insure against premature interruption of the Administrative process, (2) allow the agency to develop the necessary factual background on which to base a decision, (3) allow the exercise of agency expertise, (4) provide a more efficient process and allow the agency to correct its own mistake, and (5) insure that individuals are not encouraged to ignore administrative procedures by resort to the courts.

Estate of Friedman, 112 Wn.2d at 78 (quoting *Orion Corp. v. State*, 103 Wn.2d 441, 456-57, 693 P.2d 1369 (1985) (*Orion* I)) (citing *South Hollywood Hills Citizens Ass'n v. King Cy.*, 101 Wn.2d 68, 74, 677 P.2d 114 (1984)).

Our recent decision in *Estate of Friedman v. Pierce Cy.*, 112 Wn.2d 68, 768 P.2d 462 (1989) involved a challenge to a planned unit development (PUD) map which required that a substantial amount of land in the PUD remain "open space". The present case is similar in that some portion (perhaps one-third) of the owner's land will have to remain "open space" to protect the Hylebos wetland under present regulations. *Estate of Friedman* made clear that it will be the uncommon case where a landowner can show a constitutional violation without first exhausting available procedures in an attempt to secure a permit for possible use.[37] As noted earlier herein, King County argues that resort to administrative channels would not have been futile because the Sensitive Area Ordinance does allow development of wetlands if application of the wetland ordinance "would deny all reasonable use of a property".[38] As also noted, the County further argues that it is entirely possible that the landowner may be permitted to build a church on its land under existing regulations.

Under all futility/exhaustion authority, when we look to the tests for regulatory "takings" and due process violations, it follows that the Superior Court and the Court of Appeals correctly concluded that the claim of the landowner in this case is not yet ripe for adjudication

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[37] *Estate of Friedman*, 112 Wn.2d at 80.

[38] King County Code 21.54.170(B).

because it has not yet applied for a development permit.[39]

Because the landowner has not as yet sought any development permits, it is not possible to know what effect SEPA and other applicable regulations might have on the property in question. The Court of Appeals appropriately observed that without engaging in the application process, there is no way to know what beneficial use may be made of Presbytery's property, nor any way to know what deprivation of beneficial use was proximately caused by the Hylebos Wetland Ordinance.[40]

In *Estate of Friedman,* we disagreed with the landowner's claim of futility because there the evidence showed only that some county officials testified that the land under consideration had long been open space and should remain open space. In the present case, the only evidence regarding futility is the opinion of the landowner's expert that a number of lots in a hypothetical subdivision would have to remain open space. This was countered, however, by an affidavit of the appropriate county decisionmaker to the effect that under present regulations, the landowner would probably be allowed to build a church on the property. Clearly then, under a

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[39] *Orion Corp. v. State,* 109 Wn.2d 621, 632, 747 P.2d 1062 (1987), *cert denied,* 486 U.S. 1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988) (*Orion* II); *MacDonald, Sommer & Frates v. County of Yolo, supra; Williamson Cy. Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985); *Ackerley Communications, Inc. v. Seattle,* 92 Wn.2d 905, 602 P.2d 1177 (1979), *cert. denied,* 449 U.S. 804, 66 L. Ed. 2d 7, 101 S. Ct. 49 (1980).

[40] *Presbytery of Seattle v. King Cy.,* 53 Wn. App. 1074 (1989).

proper definition of regulatory "taking" and substantive due process, the Presbytery has not sustained its burden of showing that exhaustion would be futile.

Affirmed.

/s/ Andersen, J.
Andersen, J.

WE CONCUR:

/s/ Callow, C.J.
/s/ Utter J.
/s/ Brachenbach J.
/s/ Dolliver J.
/s/ Dore A.C.J.
resale only
/s/ Durham, J.
/s/ Smith, J.
/s/ Guy, J.

APPENDIX B

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040. IT IS SO ORDERED.

/s/ Coleman CJ
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION I

PRESBYTERY OF SEATTLE, a Washington corporation,	)	NO. 22235-O-I
Appellant,	)	
v.	)	
KING COUNTY,	)	(Filed Apr. 10, 1989)
Respondent.	)	

SCHUMACHER, JPT*--Presbytery of Seattle (Presbytery) appeals from an order dismissing its complaint against King County, which sought compensation for a taking of property resulting from the enactment of the Hylebos Wetland Ordinance. Presbytery contends that its failure to exhaust its administrative remedies was excusable because any resort to the remedies would have been futile. The dismissal is affirmed. In 1978, Presbytery purchased a single family home located on 4.5 acres in

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* Judge John W. Schumacher is serving as a judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

Federal Way. The financing documents indicate that the property was purchased for the construction of a church. However, that construction never took place, and the house on the property was rented.

In 1986, King County enacted Ordinance No. 7746 ("Hylebos Wetland Ordinance"), which affected Presbytery's property. The ordinance modified the S-E-P (suburban estates--site plan approval) zoning to impose conditions to protect the Hylebos Wetland. Those conditions include prohibitions on creations of new lots or construction within the wetland boundaries, the establishment of a 100 foot buffer to be preserved as permanent open space, and the creation of a 15 foot native growth protection easement.

Presbytery engaged an environmental consultant, R.W. Thorpe, to analyze the impact of the Hylebos Wetland Ordinance on its property. Thorpe concluded that the zoning would permit five single family residence lots, but that at least three of those lots fall within the wetland boundary or the 100 foot buffer, thus converting those lots into permanent open space. He further opined that development of the remaining lots was doubtful because of a condition that allows for expansion of the buffer in certain circumstances.

In April 1987, Presbytery filed its complaint against King County, asserting that the Hylebos Wetland Ordinance effected a taking of its property, and sought compensation for that taking. Cross-motions for summary judgment were filed. King County's motion was granted on the grounds that Presbytery had failed to exhaust its

administrative remedies before filing its complaint. The court dismissed Presbytery's complaint.

Presbytery argues that the court erred in dismissing its complaint for failure to exhaust its administrative remedies. It contends that filing an application with King County for subdivision of the property or for building permits would have been futile, because the effect of the ordinance is clear and no exceptions or variances are available. It argues that it falls within the "futile acts" exception to the rule requiring exhaustion of administrative remedies before seeking judicial relief. *Orion Corp. v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985) (*Orion I*); *Allingham v. Seattle*, 109 Wn.2d 947, 749 P.2d 160 (1988).

King County responds that the court was correct in dismissing the complaint because Presbytery never filed a development application for the property, and because the County never had the opportunity to consider and analyze the application. It argues that in addition to the Hylebos Wetland Ordinance conditions, development of the property would be regulated by preexisting statutes and ordinances, including the State Environmental Policy Act (SEPA) and the King County Sensitive Areas Ordinance. It contends that the development possibilities of the property cannot be determined in the absence of a development application. *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987) (*Orion II*); *Estate of Friedman v. Pierce Cy.*, 51 Wn. App. 176, 752 P.2d 936, *review granted*, 111 Wn.2d 1001 (1988), *aff'd*, 112 Wn.2d 68, 768 P.2d 462 (1989).

After the briefing and argument in this case, the Supreme Court filed its opinion in *Estate of Friedman*

v. Pierce Cy. In that case, the landowners argued that presentation of development proposals was factually futile because of testimony "from a number of Pierce County officials which tended to show a uniform belief that the land had long been classified as open space and should remain as open space or become a park." *Estate of Friedman v. Pierce Cy.*, 112 Wn.2d at 73. The Supreme Court affirmed the decision of the Superior Court and the Court of Appeals that the landowners failed to show that submission of the development proposals would have been futile. After holding that the question of futility is one for the court and that a landowner need not show futility by uncontroverted evidence, the Court stated:

> Therefore, it will be the uncommon case where a landowner can show a taking in the absence of exhausting available procedures in an attempt to secure a permit for possible use. In *Orion I* we made this quite clear: factual futility will be found only rarely and on unusual facts. Generally speaking, if a plat application, application for a conditional use permit or variance, or other administrative procedure could result in a decision resulting in beneficial use of the land, factual futility should not be found. Whether factual futility exists must necessarily depend upon case-by-case analysis.

Estate of Friedman v. Pierce Cy., 112 Wn.2d at 80-81.

Presbytery did not meet its burden of showing that an application for subdivision or building permits would be futile. Presbytery's evidence was the conclusion of its consultant that before the Hylebos Wetland Ordinance, the property could have been divided into five lots, but after the ordinance, at least three of those lots would be

permanent open space. It does not address other development possibilities for the property. King County's evidence was that the ordinance would not clearly prohibit the use of the property as a church, its original purpose for purchasing the property. Presbytery responded that under the guidelines it uses, the area remaining after the enactment of the ordinance is too small for construction of a church and parking lot.

This evidence indicates that an application for development "could result in a decision resulting in beneficial use of the land". King County must have the opportunity to make a final determination on the development potential of Presbytery's property. As the Supreme Court noted:

> Courts cannot address inverse condemnation claims in a vacuum. They must be able to ascertain the remaining value of the regulated property. This necessity underlies the requirement of finality of governmental action . . . . The exhaustion doctrine tends to assure that some final governmental determination as to use has been made, thus facilitating resolution of the question whether land use regulations so deprive the land of economic viability as to amount to a taking.

Estate of Friedman v. Pierce County, 112 Wn.2d at 80.

The cases where factual futility has been found are distinguishable. In *Orion I* and *Orion II,* the Supreme Court held that applying for a shoreline development permit was futile because only two uses of the property were potentially conceivable on Orion's property, one (recreation) that would provide no economic return, and the other (aquaculture) that would be incompatible with

permitted uses in the restricted area. *Orion I*, 103 Wn.2d at 458-59; *Orion II*, 109 Wn.2d at 633. In *Allingham*, the Court held that seeking a variance from the Seattle Greenbelt Ordinance was futile because even if all available variances were granted, the Ordinance would still deny the owner of the use of 40 to 50 percent of his property. *Allingham*, 109 Wn.2d at 951-52.

In the case of Presbytery's property, there has been no determination how the Hylebos Wetland Ordinance should be applied to the property. Neither has there been a determination of what effect the pre-existing SEPA regulations and the Sensitive Areas Ordinance had on the property before or after the enactment of the Hylebos Wetland Ordinance. The extent of deprivation of beneficial use was clearly defined in the ordinance invalidated in *Allingham*. There is no such clear definition here.

Without engaging in the application process, there is no way to know what beneficial use may be made of Presbytery's property, nor any way to know what deprivation of beneficial use was proximately caused by the Hylebos Wetland Ordinance. The order dismissing Presbytery's complaint for failure to exhaust its administrative remedies through the application process is affirmed. Accordingly, Presbytery's argument that the ordinance converts half of its property into permanent open space without compensation is an unconstitutional taking under the Fifth Amendment and under article 1, section 16 of the State Constitution need not and will not be addressed.

Affirmed.

APPENDIX C

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

PRESBYTERY OF SEATTLE, Plaintiff, v. KING COUNTY, Defendant.	)	NO. 87-2-07034-4 ORDER (Received May 3, 1988)

THIS MATTER came before the court on plaintiff's motion for partial summary judgment and King County's cross-motion for summary judgment on April 20, 1988. The plaintiff was represented by its attorney of record, Montgomery, Purdue, Blankinship & Austin, by John D. Blankinship and King County was represented by its attorneys of record, Norm Maleng by Ann Schindler, Deputy Prosecuting Attorney. The court having heard oral argument and reviewed the files and pleadings including the following:

-- Plaintiff's Motion for Partial Summary Judgment

-- Memorandum In Support of Plaintiff's Motion for Partial Summary Judgment

-- Declaration of R. W. Thorpe

-- King County's Response to Plaintiff's Motion for Partial Summary Judgment and Cross-Motion of King County for such Summary Judgment

-- Affidavit of Bryan Glynn

-- Affidavit of Dyanne Sheldon

-- Affidavit of Jim Reid

-- Affidavit of Ann Schindler

-- Plaintiff's Rebutal Memorandum on Plaintiff's Motion for Summary Judgment

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for Partial Summary Judgment is denied.

2. King County's Cross-Motion to dismiss plaintiff's lawsuit on the grounds that the owner failed to exhaust its administrative remedies is granted.

3. Presbytery of Seattle's lawsuit is dismissed.

DONE IN OPEN COURT this 3 day of May, 1988.

/s/ Robert E. Dixon
Honorable ROBERT E. DIXON,
Judge

Presented by:

NORM MALENG
King County Prosecuting Attorney

BY /s/ Ann Schindler
ANN SCHINDLER
Deputy Prosecuting Attorney
Attorney for King County

Agreed as to Form; Notice of
Presentation Waived:

MONTGOMERY, PURDUE, BLANKINSHIP
& AUSTIN

BY /s/ John D. Blankinship
JOHN D. BLANKINSHIP
Attorneys for Presbytery of Seattle

APPENDIX D

THE SUPREME COURT OF WASHINGTON

PRESBYTERY OF SEATTLE,

Petitioner,

v.

KING COUNTY,

Respondent.

No. 56111-7

ORDER DENYING MOTION FOR RECONSIDERATION

(Filed May 17, 1990)

The Court having decided unanimously that the petitioner's motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 17th day of May, 1990.

/s/ Keith M. Callow
Chief Justice

114 Wn.2d 320

APPENDIX E

ORDINANCE NO. 7746

AN ORDINANCE relating to Comprehensive Planning; repealing Ordinances 1435, 2401, 2907, 4733 and 6341; repealing KCC 20.12.108; adopting the Federal Way Community Plan Update; and adopting the Revised Federal Way Community Plan Area Zoning.

PREAMBLE:

For the purpose of effective area-wide planning and regulation, the King County Council makes the following legislative findings:

1. The Federal Way Community Plan, adopted June 9, 1975 by Ordinance 2401 and amended by Ordinances 4733 in May 1980 and 6341 in March 1983, augments and amplifies the King County Comprehensive Plan.

2. King County, with the assistance of the Federal Way Community Pan update Citizen Advisory Committee and extensive citizen input, has studied and considered alternative commercial, industrial and multifamily housing development policies and zoning to provide for the orderly development of Federal Way and has considered the social, economic and environmental impacts of the plan and area-wide zoning. King County has prepared and distributed an Environmental Impact Statement for the Federal Way Community Plan Update and Area zoning.

3. The Federal Way Community Plan Update and Area Zoning provide for the coordination and regulation of public and private development and bear a substantial relationship to, and are necessary for, the public health, safety, and general welfare of King County and its citizens.

BE IT ORDAINED BY THE COUNCIL OF KING COUNTY:

SECTION 1. Ordinances 1435, 2401, 2907, 4733 and 6341 and KCC 20.12.180 are hereby repealed and the following is substituted:

A. The Federal Way Community Plan Update, attached to Ordinance 7746 as Appendix A, is adopted as an amplification and augmentation of the Comprehensive Plan for King County.

B. The revised Federal Way Community Plan Area Zoning, attached to Ordinance 7746 as Appendix B, is adopted as the official zoning control for that portion of unincorporated King County defined therein.

INTRODUCED AND READ for the first time this 13th day of January, 1986.

PASSED this 2nd day of September, 1986.

KING COUNTY COUNCIL
KING COUNTY, WASHINGTON

/s/ *Audrey Gruger*

ATTEST:

/s/ *Dorothy M. Owens*
Clerk of the Council

APPROVED this 12th day of September, 1986.

/s/ *Tim Hill*
King County Executive

[ATTACHMENT A TO ORDINANCE NO. 7746]

HYLEBOS WETLAND #18 PROTECTION IS NECESSARY

Hylebos Wetland No. 18 is unique in many ways. Its protection has been a focal point of two planning efforts. For a detailed discussion of the wetland and the related policies, see chapter five of the Federal Way Community Plan.

The development conditions, in tandem with the surrounding land use concept, protect the integrity of the Hylebos wetland system and are vital to the maintenance of its unique qualities. The conditions were drawn from work on wetlands inventory, rating and protection methods currently being developed by the King County Planning Division's Resource Planning Section. (This work is aimed toward revising the Sensitive Areas Ordinance in order to distinguish among wetland types and provide King County's most important wetlands with more comprehensive protection) The property-specific application of the following development conditions are found on the individual zoning maps. These conditions are as follows:

1. *Wetland Studies - Required*

   The Department of Planning and Community Development's director may require a special wetland study for development outside the Hylebos Wetland #18's required 100 foot buffer if the development may cause a wetland alteration or otherwise pose potential significant adverse impacts to wetland values and functions.

2. *Wetland Studies - Preparation and Contents*

   The Wetland study shall be conducted by a biologist, botanist, plant ecologist or similarly qualified professional with the assistance, if required by BALD or

SWM, of a professional engineer. Minimum requirements for identifying and mapping the wetland edge and the preparation and contents of the wetland study shall be contained in administrative guidelines prepared by the Department.

3. *Wetland Edge - Identification*

As a part of the required wetland study, the edge of the Hylebos Wetland #18 shall be identified using a transect or other accepted scientific method which is acceptable to the department; provided, the director is authorized to require a specific method to identify the wetland edge.

The criteria for locating the wetland edge are based on the principle of predominance of wetland plants as set forth in the definition of wetlands which appears in KCC 21.04: "Wetlands areas inundated or saturated by surface or groundwater at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adopted for life in saturated soil conditions."

The wetland edge is the line around the wetland where the prevalence of hydrophytes, or wetland plants, ceases. For the purpose of defining the wetland edge, the prevalence, of hydrophytes ceases where the combined percent of hydrophytes in the overstory, understory and ground over is less than fifty percent.

4. *Protection and Recording*

a. Those portions of the Hylebos Wetland #18 located within a proposed subdivision shall be protected as permanent open space by dedication to a home owner association, community or public body approved by the department director.

For development subject to other permits, King County shall encourage protection of the Hylebos Wetland #18 as permanent easement, conservation easement or Native Growth Protection Easement, dedication or other alternative means acceptable to King County.

b. Creation of new lots other than separate tracts dedicated or reserved as permanent open space shall not be permitted inside the Hylebos Wetland #18.

c. As a condition of any permit approval, the applicant shall record, with the Records and Elections Division, on the title to the subject property or properties, a notice which alters current and future property owners of the presence and location of the Hylebos Wetland #18, King County regulations which may apply to any future development and any conditions required by King County of the permit approval. The notice shall be on a form provided by the director.

5. *Wetland Buffer - Required*

a. General Provisions

1) The width of the buffer shall be determined by measurement which is perpendicular to the identified wetland edge at all points.

2) The outside boundary of the buffer shall be surveyed and shown on all plats, short plats or PUDs.

b. Minimum Buffer Width

New development adjacent to the Hylebos Wetlands shall preserve an undisturbed buffer not less than 100 feet wide.

c. Increased Buffer Width

The buffer's width shall be increased over the required 100 foot minimum when either of the following exist within or adjacent to the wetland buffer: 1) endangered, threatened or sensitive species; or 2) roads, utility rights-of-way, dikes, channels, etc. Provisions for increasing the buffer's width shall be contained in administrative guidelines prepared by the Department.

d. Adjacent Stream Corridors

New development adjacent to streams which enter or leave the Hylebos Wetlands shall preserve an undisturbed corridor, on the property subject to the applicable development permit, which is wide enough to maintain the natural hydraulic and habitat functions of that stream. Provisions for preserving adjacent stream corridors shall be contained in administrative guidelines prepared by the Department.

6. *Alternation*

Alternation of the Hylebos Wetland #18 and its required buffer is prohibited except for: 1) facilities necessary to allow controlled pedestrian access for scientific, educational or interpretive activities; or 2) fences or other barriers necessary to protect wetland habitat.

7. *Enhancement - Required*

Alternation of the Hylebos Wetland #18 or its buffer for facilities necessary to allow controlled pedestrian access for scientific, educational or interpretive activities shall not be permitted unless accompanied by a County-approved enhancement plan.

8. *Restoration - Required*

If the Hylebos Wetland #18 and/or its required buffer has been partially or totally altered without an

approved development permit or in violation of the conditions of any applicable permit, complete restoration pursuant to an approved restoration plan shall be required. Restoration measures include, but are not limited to, removal of fill, regrading to original contours and revegetation of all cleared areas with natives trees and/or plants which are necessary to replace wetland values and functions lost due to alternation. If information on wetland values and functions prior to alternation is not available, the department shall specify the criteria for restoration. Restoration shall be completed prior to approval of any development permits.

9. *Restoration and Enhancement Plans - Preparation and Contents*

. . . .

10. *Water Quantity and Quality*

The following provisions shall apply to the protection of water quantity and quality in the Hylebos Wetland #18:

. . . .

11. *Endangered, Threatened and Sensitive Species - Protection*

. . . .

12. *Human Access*

The following provisions shall apply to human access and interpretive use in the Hylebos Wetland #18:

. . . .

[ATTACHMENT B TO ORDINANCE 7746]

S-E-P to S-E-P

The purpose of this reclassification is to replace the wetland-related development conditions established in 1980. The conditions established during the plan update and approved on September 2, 1986 (Ordinance 7746) were:

- The twelve Hylebos Wetland #18 development conditions shall direct all development of this site. See Section 2B of the area zoning introduction for those conditions.

APPENDIX F

IN THE SUPERIOR COURT OF
WASHINGTON FOR KING COUNTY

PRESBYTERY OF SEATTLE, a Washington corporation,	)	No.
Plaintiff,	)	COMPLAINT FOR DAMAGES FOR INVERSE CONDEMNATION
vs.	)	
KING COUNTY,	)	
Defendant.	)	

The Presbytery of Seattle alleges:

I.

It is a non-profit Washington corporation which has paid all of its annual license fees to the state of Washington to date and has standing to assert this claim.

II.

The plaintiff owns the real property described on attached sheet, which is a tract containing approximately four and one-half acres. Said tract is zoned for purposes which include use of the land as a church for which purpose the plaintiff acquired the property.

III.

In the guise of protection of wetlands the defendant now prevents use of the plaintiff's land for a church and

associated parking or for any other economically reasonable or profitable use. The actions of the County constitute inverse condemnation of the plaintiff's land for which the defendant should be required to pay the plaintiff fair compensation.

WHEREFORE, the plaintiff prays for an order of the court adjudging that the defendant has inversely condemned the plaintiff's land and for judgment against the defendant for such amount as fair compensation for said tract as may be hereafter established at trial. The plaintiff further prays for its costs and attorneys' fees herein.

DATED April 23rd, 1987.

MONTGOMERY, PURDUE,
BLANKINSHIP & AUSTIN

By _____
JOHN D. BLANKINSHIP
Of Attorneys for Plaintiff

By _____
GALE D. BARBEE
Of Attorneys for Plaintiff

APPENDIX G

IN THE SUPERIOR COURT OF
WASHINGTON FOR KING COUNTY

PRESBYTERY OF SEATTLE, a Washington corporation, Plaintiff, vs. KING COUNTY, Defendant.	No. 87-2-07034-4 PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiff moves as follows:

A. *Relief Requested.* Partial summary judgment. That King County Ordinance No. 7746 constitutes a taking of the plaintiff's property for which the plaintiff is entitled to just compensation to be determined in a future hearing.

B. *Statement of Facts.* On September 12, 1986, King County enacted Ordinance No. 7746 which adopted the Revised Federal Way Community Plan Zoning as the official zoning control for the lands referred to therein. The ordinance reclassified the plaintiff's property to a zoning which allows for five residential lots but preserves at least three of them to permanent open space in which any development is prohibited and even human access restricted. The impact of the ordinance makes use of the remaining two lots doubtful because of the provision in the ordinance that the Hylebos Wetland #18 may be increased "when either of the following exists within or

adjacent to the wetland buffer: (1) endangered, threatened or sensitive species; or (2) roads, utility rights-of-way, dikes, channels, etc."

C. *Statement of Issues.* Whether the ordinance constitutes a taking of the plaintiff's property contrary to the federal and state constitutions.

D. *Evidence Relied Upon.* Declaration of R.W. Thorpe to which are attached excerpts of the County Ordinance and of the Federal Way Community Plan and Area Zoning incorporated therein by reference.

E. *Legal Authority.* Memorandum attached.

F. *Proposed Order.* Copy attached.

DATED March ___, 1988.

MONTGOMERY, PURDUE,
BLANKINSHIP & AUSTIN

By /s/ Gale D. Barbee
Gale D. Barbee

By /s/ John D. Blankinship
John D. Blankinship, P.S.

Attorneys for Plaintiff